

1
2
3
4
5
6
7
8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
10

11
12 TRI-VALLEY CARES, MARYLIA) Case No. 08-cv-01372-SBA
13 KELLEY, JANIS KATE TURNER, and) **[PROPOSED] ORDER GRANTING**
14 JEDIDJAH DE VRIES,) **PLAINTIFFS' MOTION FOR LEAVE TO**
15 Plaintiffs,) **FILE SUPPLEMENTARY BRIEF IN**
16 vs.) **SUPPORT OF PLAINTIFFS' MOTION**
17 UNITED STATES DEPARTMENT OF) **FOR PRELIMINARY INJUNCTION**
18 ENERGY, NATIONAL NUCLEAR)
19 SECURITY ADMINISTRATION, and)
20 LAWRENCE LIVERMORE NATIONAL)
21 LABORATORY,)
22 Defendants)

23
24 This matter comes before the Court on the motion for leave to file supplementary brief in
25 support of Plaintiffs' motion for preliminary injunction, filed by plaintiffs Tri-Valley CAREs,
26 Marylia Kelley, Janis Kate Turner, and Jedidjah de Vries (collectively, "Plaintiffs"). The Court
27 hereby GRANTS Plaintiffs' motion for leave to file supplementary brief in support of Plaintiffs'
28 motion for preliminary injunction.

BACKGROUND

Plaintiffs seek an order granting them leave to file a supplementary brief in support of their motion for preliminary injunction, which was taken under submission by the Court on May 6, 2008. Plaintiffs' supplementary brief concerns their third claim for relief, alleging that defendants United States Department of Energy, National Nuclear Security Administration, and Lawrence Livermore National Laboratory ("Livermore Lab" or "LLNL") (collectively, "Defendants") violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321-4370d (1975), and applicable regulations implementing NEPA by failing to prepare a supplement to the final Revised Environmental Assessment ("EA") for the proposed Biosafety Level 3 ("BSL-3") facility at Livermore Lab. Plaintiffs seek leave to file their supplementary brief in response to the recent emergence of material facts regarding the adequacy of the security programs at Livermore Lab.

LEGAL STANDARD

Pursuant to Civil Local Rule 7-2, Plaintiffs' filed their motion for leave to file supplementary brief in support of Plaintiffs' motion for preliminary injunction. A hearing on the matter was scheduled for July 29, 2008, at 1:00 PM.

Federal agencies have "a continuing duty to gather and evaluate new information relevant to the environmental impact of [their] actions." *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1024 (9th Cir. 1980) (citing 42 U.S.C. § 4332(2)(A-B)). Pursuant to the Council on Environmental Quality's regulations implementing NEPA, agencies shall prepare supplements to either draft or final Environmental Impact Statements ("EIS") if "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1509(c)(1)(ii) (1978). The standard for supplementing an EA

1 is the same as for an EIS. *Idaho Sporting Congress, Inc. v. Alexander*, 222 F.3d 562, 566 n.2 (9th
2 Cir. 2000) (citations omitted).

3 ANALYSIS

4 The results of the recent assessment of LLNL's security programs indicate that Livermore
5 Lab is vulnerable to terrorist attack. Plaintiffs have provided this information to Defendants in
6 detail, and Defendants have neglected to prepare a supplement to the final Revised EA to analyze
7 this information. Because the identified security failures invalidate some of the assumptions
8 contained in the final Revised EA, Defendants' analysis contained therein is vitiated. As such, the
9 results of the security assessment provide further support for Plaintiffs' motion for preliminary
10 injunction by establishing a greater likelihood of success on the merits.
11

12 Information concerning the LLNL security assessment was not available when the Court
13 took Plaintiffs' motion for preliminary injunction under submission on May 6, 2008.
14 Accordingly, Plaintiffs were not permitted the opportunity to highlight the significance of this
15 information, which meets the threshold for supplementation of the final Revised EA for the
16 proposed BSL-3 facility. Plaintiffs' supplementary brief analyzes the results of the security
17 assessment in concise form and provides information that is essential to the Court's resolution of
18 Plaintiffs' motion for preliminary injunction.
19

20 CONCLUSION

21 Based on the foregoing,
22

23 IT IS HERBEY ORDERED THAT Plaintiffs' motion for leave to file supplementary brief
24 in support of Plaintiffs' motion for preliminary injunction is GRANTED.
25

26 IT IS SO ORDERED.
27
28

1 Dated: _____, 2008

2 _____
3 SAUNDRA BROWN ARMSTRONG
4 United States District Judge
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28